90-859

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. _____

BROWER'S MOVING & STORAGE, INC.
Petitioner,

-against-

NATIONAL LABOR RELATIONS BOARD AND LOCAL 814, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Notwithstanding, that for more than twenty years the Union had no contact with the Employer or its employees, and never demanded bargaining nor serviced the shop, the National Labor Relations Board ("NLRB") found that, in effect, through the actions of the Union's ERISA/LMRA-governed* funds, the Union established its representation of the Employer's employees. The Employer's argument that there was no collective bargaining relationship and that therefore it did not violate §8(a) (5) & (1) of the National Labor Relations Act ("Act"), 29 U.S.C. §158(a) (5) & (1), was rejected by the NLRB.

The questions presented are:

1) Did the NLRB err in crediting the Funds' conduct in pursuing alleged delinquent contributions as evidence of the Union's conduct in enforcing the alleged contracts with the Employer?

2) Whether the Act requires that the Union demand bargaining as a condition precedent for sustaining a "refusal to bargain" charge under §8(a) (5)?

3) Whether the NLRB misapplied its precedents concerning the rebuttable presumption of the Union's majority status during the term of the allegedly unexpired collective bargaining agreement?

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*Employee Retirement Income Security Act §§403-06, 29 U.S.C. §§1103-06, Labor Management Relations Act §302, 29 U.S.C. §186.

LIST OF PARTIES

The parties to the proceedings below were the petitioner Brower's Moving & Storage, Inc.**. the respondent National Labor Relations Board and the Intervenor Local 814, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.

** Brower's Moving & Storage, Inc, filing this Petition for a Writ of Certiorari in this case, states that its full name is Brower's Moving & Storage, Inc. and that it has no parent companies, or subsidiaries to list pursuant to U.S. Sup. Ct. Rule 29.1.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Brower's Moving & Storage, Inc., ("Brower's") prays that a writ of certiorari issue to review the summary order and opinion of the United States Court of Appeals for the Second Circuit entered in this case on August 29, 1990.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Second Circuit is reported at 914 F.2d 239 and is reprinted in Appendix A. The Decision and Order of the National Labor Relations Board is reported at 297 NLRB No. 28 and is reprinted in Appendix B.

JURISDICTION

Pursuant to §10(b) of the National Labor Relations Act ("Act"), 29 U.S.C. §150(b), the National Labor Relations Board ("NLRB" or "Board") caused to be issued a complaint alleging that Brower's violated sections 8(a) (5) and (1) of the Act, 29 U.S.C. §158(a) (5) and (1). After reviewing the record established in a hearing before its designated agent, the NLRB held that Brower's violated the Act, 29 U.S.C. §158(a) (5) and (1). Pursuant to §10(e) of the Act, 29 U.S.C. §160(e), the NLRB petitioned the Second Circuit for enforcement of its Order. The Order was enforced on August 29, 1990.

The jurisdiction of this Court to review the order and decree of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

National Labor Relations Act §§8(a) (1) & (5), and (9)(a), 29 U.S.C. §§158(a) (1) & (5) and 159(a) (in relevant part):

§8(a) It shall be an unfair labor practice for an employer–

(1) to interfere with, restrain, or coerce employees in the exercise of the right guaranteed in section 7;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to this provisions of section 9(a);

§9(a) Representatives designated or selected for the purposes of collective bargaining by a majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay wages, hours of employment, or other condition of employment. ...

STATEMENT OF THE CASE

Brower's Moving & Storage, Inc.'s ("Brower's") introduction to Local 814 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO ("Union") occurred in or about 1951 when the Union's agents forced a Brower's truck off the road and demanded that the company become a Union barn. (A: 236, 299.)[1] A Union representative subsequently came to Brower's' place of business and signed up a number of it's employees, including principals and officers, but he never gave Brower's a contract to execute. (A: 236-37.) There was never an election or other means pursuant to §9(a) of the Act (ie: NLRB certification or the presentation of executed union cards) establishing that the Union represented the interests of a majority of the Brower's employees. (A: 237.)

In addition, the Union never requested nor negotiated an independent collective bargaining agreement with Brower's (A: 238, 256, 299, 301). And, because Brower's never belonged to any association of employers with whom the Union negotiated its collective bargaining agreements (A: 292-93) there is no bargaining history. Brower's simply signed printed contracts or stipulations sent to it by the Union.

The Union never administered the agreements Brower's signed. It never appointed a Brower's employee as the shop steward (A: 75 ¶7 (L), 237-38 and 302), nor a replacement delegate after its original representative to Brower's died in the mid to late 1950's. (A: 72 ¶4, 238.) Other than a monthly

[1] Numbers in parentheses preceded by the letter "A:" refer to the references in the Joint Appendix filed with the Second Circuit, which included the complete transcript of the administrative hearing.

visit in the early years by its agent to collect dues directly from an unknown number of individuals presumably maintaining their Union membership (A: 236-38), the Union did nothing to enforce the successive agreements.[2] (A: 252-56, Appendix B at 24-26.)

Brower's' noncompliance was no secret to the Union. For example, in or about October 1967, Brower's directed its counsel to explore with the Union placing one of its long-time employees in the Union so he could receive a pension and hospitalization. (A: 238.) Thus, the Union learned that Brower's employed someone for approximately ten years without his ever becoming a member of the Union, but did not even ask whether there were any other employees who should also be members of the Union or whether other provisions of the collective bargaining agreement were being ignored by Brower's. (A: 239-40 & Appendix C at 26.) Brower's' blatant noncompliance with the underpinnings of the alleged collective bargaining relationship (that employees be members of the Union) was simply ignored by the Union. Even after the Union and Brower's agreed that Brower's would pay one individual's back dues and benefit fund contributions to make him eligible for full benefits, the Union did not ask whether there were any other Brower's employees failing to maintain Union membership. (A: 170, 238-40.)

Another example is that in 1981 the Union's benefit funds, Local 814 Pension, Annuity and Welfare Funds ("Funds"), commenced a state court action against Brower's for allegedly

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[2]One exception concerns Wesley Brower, who testified that he was informed by the Union in 1956 that as an owner he could no longer drive a Brower's truck with a Union man sitting next to him. (A:300 & Appendix B at 20.) Mr. Brower rejected the Union's demand, continued to drive the Brower's vehicle, and the Union never raised the issue again. (A: 305.)

delinquent contributions. (Appendix B at 18.) The trustees of the Funds, who included representatives of the Union, negotiated a settlement based upon an estimation of the delinquencies because no audit was performed. (A: 181 ¶7.) While the Funds were litigating the issue of delinquent contributions, Brower's continued contributing only for the two Brower family members. (A: 245.) Yet the Union again failed to contact or even ask whether the terms of its agreements were being complied with, let alone to enforce them. (A: 245-47.)

The Union next demonstrated its abandonment of the contract after the Funds' December 1987 audit performed by Peter Furtado. Mr. Furtado, who was fully aware of Brower's' noncompliance with the collective bargaining agreement, subsequently became the interim Secretary Treasurer of the Union on September 9, 1988. (A: 289-90.) Notwithstanding that Mr. Furtado's responsibilities as the Secretary Treasurer included the initiation of Union actions against employers for their noncompliance with the collective bargaining agreement (A:290), he did nothing more than advise the Union's President of Brower's' noncompliance. (A: 292.) Thus, even though the Union, through Mr. Furtado, was aware of Brower's' noncompliance the Union again did nothing.[3]

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[3] In the hearing below, Brower's served the Union with a subpoena duces tecum for the production of documents concerning its negotiations with Brower's, its representation of Brower's' employees, its designation of Union shop stewards and delegates and its general administration of the collective bargaining agreements. (A:157-166.) The Union's response consisted of the Notice of Delinquency from the Funds (A: 167), a single form letter sent to all employers asking for a seniority list and the Union's confirmation of receipt of a list from Brower's consisting of the two Brower's family members. (A: 168-69.) Thus, the Union's own records reveal that it was not conducting any business with Brower's associated with its alleged representation of the Brower's' employees, at least from 1983 to the date of the hearing.

Significantly, the Union had numerous opportunities to demonstrate that it did not abandon its representation of Brower's' employees. As early as April 18, 1988 Brower's served its Answer on the Funds' (and Union's) attorneys in the federal action brought by the Funds (A: 147-156), *Benson v. Brower's Moving & Storage, Inc.*, 726 F.Supp. 31 (E.D.N.Y. 1989), *aff'd*, 907 F.2d 310 (2d Cir. 1990), *cert. petition pending*, Docket No. 90-527, which apprised the Union's counsel of Brower's' noncompliance. Yet the Union did nothing to enforce any of its alleged rights under the alleged collective bargaining agreement, including, but not limited to, demanding bargaining over the litany of provisions that were admittedly not being followed by Brower's.[4]

Even after Brower's filed its election petition with the NLRB on September 29, 1988 acknowledging noncompliance with the 1986-89 Agreement (A:71), the Union did not contact Brower's to discuss, let alone demand, compliance with any provision of its alleged contract (A: 243-247). Instead, on October 11, 1988 the Union filed a charge (A:1) alleging that Brower's violated §§8(a) (1) and (5) of the Act, 29 U.S.C. §158(a) (1) and (5), by failing and refusing to apply the alleged contract as if it had inquired into and then demanded compliance. The NLRB's General Counsel thereafter issued a complaint alleging that from April 11, 1988 Brower's "refused to bargain collectively and is refusing to bargain collectively with the representative of its employees..." (A: 5, ¶11.) Brower's' Answer denied the allegations. (A: 8).

In the hearing before the NLRB's Administrative Law

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[4] The ALJ in numerous places erroneously identified the Union as the actor instead of the Funds. (Appendix B at 17, 19, 20, 21, 25, 26.) Brower's excepted to these findings of the ALJ. (See Appendix C.)

Judge ("ALJ"), Brower's contended that the alleged collective bargaining agreement and bargaining relationship had long been abandoned by the Union, that the Union by its conduct waived any right to enforce the terms of the agreement and that the General Counsel failed to establish the factual predicate to sustain the substantive allegation of the complaint, namely, that Brower's refused to bargain with a union representing the majority of its employees.

After hearing all of the evidence, the ALJ recommended the dismissal of the complaint because the Union did not represent a majority of Brower's employees and alternatively that the Union abandoned its representation of the Brower's employees (Appendix B at 26 & n.3). The ALJ neither addressed nor ruled on Brower's' third argument that the Union never demanded bargaining as specifically outlined in its charge and the General Counsel's complaint. (A: 1 & 2-7).

Both Brower's and the Counsel for the General Counsel filed Exceptions to the ALJ's conclusions with the NLRB.[5] On November 8, 1989, the NLRB issued its Decision and Order rejecting the recommended order of the ALJ and finding that Brower's violated §§8(a) (1) and (5) of the Act by repudiating and refusing to abide by the terms of the alleged collective bargaining agreement. (Appendix B at 9.) The NLRB cited to the Union's request to Wesley Brower (in 1956!) not to drive a truck, the single request for a seniority

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[5] Five of Brower's' six Exceptions (see Appendix C) concerned the ALJ's identifying the Union or its agents as taking specific actions when in fact the actions were those of the Funds. For Example, the ALJ erroneously identified the Union as the plaintiff in *Benson v. Brower's Moving & Storage, Inc.*, 426 F.Supp. 31 (E.D.N.Y. 1989), *aff'd*, 907 F.2d 310 (2d Cir. 1990), *cert. petition pending* Docket #90-527. In its Decision and Order the NLRB did not address any of Brower's Exceptions.

list in 1983 and the activities of the Funds as evidence of a collective bargaining relationship and the Union's enforcement of the agreements for over thirty years. (Appendix B at 7.)

Brower's refused to comply with the NLRB's order to obtain judicial review pursuant to §10(e) of the Act, 29 U.S.C. §160(e). The NLRB then filed a petition for enforcement with the Second Circuit. Brower's answered the petition denying the NLRB's allegations and further contending that "the findings of fact and conclusions of law of the NLRB were erroneous, and were not supported by substantial evidence on the record considered as a whole." (A:341.)

Before the Second Circuit Brower's argued that a) the NLRB's order was unsupported by substantial evidence[6], b) the NLRB erroneously created a new, arbitrary and capricious rule excusing the Union's twenty year absence on the grounds that the Union had not received *formal* notice of any contract violations by the Employer; c) the NLRB erroneously sustained a refusal to bargain charge based upon the Union's *single* act of filing a charge within the applicable statute of limitations (§10[b] of the Act, 29 U.S.C. §160[b]), d) the NLRB erred by not requiring its General Counsel to establish that the Union demanded bargaining as a condition precedent to sustaining the §8(a) (5) charge, e) the NLRB erred by holding that the ERISA/LMRA-governed Funds' actions were evidence of the Union's intention to maintain a collective bargaining relationship as well as to enforce the alleged contracts, and f) the NLRB improperly applied its precedents concerning the rebuttable presumption of majority status.

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[6] Brower's pointed out that in key instances the NLRB cited specific actions as those of the Union when in fact they were those of the Funds.

By a summary Order, dated August 29, 1990, the Second Circuit granted the NLRB's petition finding that substantial evidence on the record as a whole supported the NLRB's findings. (Appendix A at 4.)

POINT I

BECAUSE THE RECORD IS BEREFT OF ANY EVIDENCE THAT THE UNION ACTED TO ENFORCE ITS ALLEGED CONTRACT, THE SECOND CIRCUIT ERRONEOUSLY PERMITTED THE NLRB TO RELY UPON THE ACTIONS OF ERISA/LMRA GOVERNED FUNDS AS EVIDENCE OF THE UNION'S ENFORCEMENT ACTIVITY.

In the absence of evidence that the Union took any action in the past twenty years to enforce the terms of the alleged contracts, the Second Circuit erroneously found that:

> The Board made a number of findings confirming the parties' intent to form a valid, ongoing collective bargaining relationship, including the Company's assent to successive agreements over a period of years, its payment of dues and contributions for several employees over a substantial period of time and the Union's efforts on behalf of employees in a number of instances to secure affirmative compliance with the contract.

(Appendix at A-4).[7]

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[7] The execution of agreements is not dispositive. (See Point V below.) Brower's paid dues for only one employee as part of an effort to put him in the Union. (A:238-39.) The Brower family members, nonemployees under the Act, paid their dues independently. (A:75 ¶11.)

There is simply no factual (or legal) foundation in the record to support the Second Circuit's conclusion that the Union in a number of instances made any effort "to secure affirmative compliance with the contract." Since it is undisputed that the Union has not had any contact with Brower's since in or about 1967, and certainly during the term of the 1986-89 contract at issue before the NLRB, the only means available to the NLRB and the Second Circuit to reach their stated conclusion of Union enforcement activity is to hold that the Funds' actions were in behalf of the Union—the creation of an agency relationship between the Union and the ERISA/LMRA-governed Funds. In the Second Circuit the NLRB denied that it was relying upon any agency principle. But in the absence of any evidence in the record that the Union did anything in the last twenty years other than file the charge on October 11, 1988, the NLRB's denial is disingenuous to the extent that it explicitly relied upon the activities of the Funds as evidence of an enforceable agreement. (Appendix B at 7.)

Furthermore, the NLRB was well-aware that only the Funds were taking actions against Brower's because Brower's' Exceptions identify several instances where the ALJ erroneously labelled actions taken by the Funds pursuant to their fiduciary responsibilities as the actions of the Union. (See Appendix C.) Yet the NLRB ignored Brower's' Exceptions by failing to distinguish the actions of the Funds in carrying out their statutory duties from the actions of the Union. On the record in this case, the NLRB exceeded its mandate and established the Union's intent to maintain a collective bargaining relationship by relying upon the ERISA/LMRA-governed Funds' exercise of their fiduciary duties.

POINT II

THE SECOND CIRCUIT APPLIED AN IMPROPER STANDARD OF REVIEW TO THE NLRB'S FINDING THAT THE UNION, THROUGH THE ACTIONS OF ITS FUNDS, AFFIRMATIVELY SOUGHT TO ENFORCE THE ALLEGED CONTRACTS.

The NLRB's interpretation of legal issues outside its mandate and expertise is entitled to no particular deference from the reviewing courts. *Local 777, Democratic Union, Etc. v. NLRB*, 603 F.2d 862, 869 n.17 (D.C. Cir. 1979); *NLRB v. Better Building Supply Corp.*, 837 F.2d 377, 378 (9th Cir. 1988) (Case turned on NLRB's interpretation of the federal bankruptcy code which was entitled to no deference from the reviewing court.) Here, the NLRB exceeded its mandate by relying upon the actions of the Funds, which Congress intended to be independent of the parochial concerns of both the Union and employers, as evidence of the Union's intention to enforce the contracts. The NRLB's involvement of the Funds in behalf of the Union is contrary to Congress' intent and constitutes the NLRB's unauthorized "movement into a new area of regulation which Congress had not committed to it." *NLRB v. Insurance Agents' Int'l Union, AFL-CIO*, 361 U.S. 477, 490, 80 S.Ct. 419, 433 (1960).

The NLRB further errs by failing to articulate a rationale for its holding that the Union itself made any effort to secure compliance with the alleged contract where the record is devoid of any supporting evidence. The NLRB cites only one incident, in over twenty years, of action taken by the Union, the 1983 seniority list request. (Appendix B at 7.) Therefore,

the only logical deduction is that the NLRB found that the actions of the third-party beneficiary Funds were evidence of the Union's intentions.

The NLRB's failure to articulate its rule and rationale, a " 'simple but fundamental rule of administrative law,' [cite omitted], that the agency must set forth clearly the grounds on which it acted" *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 807, 93 S.Ct. 2367, 2374 (1973), alone warranted the Second Circuit's denial of the NLRB's petition. But the Second Circuit, deferring to the NLRB's findings, lock, stock and barrel, shirked its responsibilities under this Court's holding in *NLRB v. Brown*, 380 U.S. 278, 291-92, 85 S.Ct. 980, 988 (1965) (Reviewing courts obligated to set aside decisions inconsistent with the Act and which contain erroneous conclusions) and granted the NLRB's petition. *See also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490, 71 S.Ct. 456, 466 (1951) (NLRB orders must be set aside when the record does not justify the NLRB's conclusions.)

The NLRB's reliance upon the Funds' actions is a matter beyond its recognized area of special competence and its statutory mandate. *NLRB v. Insurance Agents' Int'l Union, AFL-CIO*, 361 U.S. at 499, 80 S.Ct. at 433. The actions of independent LMRA/ERISA funds may not be relied upon by the NLRB to establish the Union's intent to enforce the alleged collective bargaining agreements. Such a rule is fundamentally inconsistent with the Act because it permits the NLRB to usurp Congress' policy decision establishing the Funds' independence. *See Ford Motor Co. v. NLRB*, 441 U.S. 488, 497, 99 S.Ct. 1842, 1849 (1979). Note, had the Funds been delinquent in meeting their fiduciary obligations and not

sued Brower's, no court would hold that it was evidence of the Union's intention not to enforce the contracts. *Waggoner v. Dallaire*, 649 F.2d 1362, 1368 (9th Cir. 1981) (Trust authorities have no authority to direct the Union.), *cert. denied*, 475 U.S. 1064, 106 S.Ct. 1374 (1986). Thus no court should hold that the Funds' actions are evidence of the Union's enforcement. The Second Circuit's failure to address this issue by applying an improper and deferential standard of review to the NLRB's order renders its decision in this case in conflict with ERISA, the LMRA and the precedents of this Court. U.S. Sup.Ct. Rule 10.1(c). The writ of certiorari should be granted.

POINT III

THE SECOND CIRCUIT ERRED BY PERMITTING THE NLRB TO RELY UPON THE ACTIONS OF THE FUNDS AS EVIDENCE OF THE UNION'S ENFORCEMENT OF THE CONTRACT, BECAUSE AS A MATTER OF LAW THE FUNDS CANNOT SERVE AS THE AGENT OF THE UNION.

A. The Funds Cannot Serve as the "Agent" for the Union.

Before the NLRB and the Second Circuit, Brower's contended that both the Employee Retirement Income Security Act ("ERISA") §404(a) (1), 29 U.S.C. §1104(a) (1), and the Labor Management Relations Act ("LMRA") §302(c) (5), 29 U.S.C. §186(c) (5) preclude the NLRB from finding that the action of the Funds is evidence of the Union's active enforcement of the alleged contract. The Second Circuit's Order does not even address the issue, but simply accepts the NLRB's unsupported assertion that the *Union* enforced the alleged

contracts over the past twenty years. (Appendix B at 7.)

The Funds in this case are multi-employer benefit trusts established "for the sole and exclusive benefit ... of the employees of ..." the employers who contribute to the Funds. LMRA §302(c) (5). The Funds, as well as their trustees, must be completely independent from the Union and employers to ensure that they function for the sole benefit of the trust beneficiaries. *Id; NLRB v. Amax Coal Co., Etc.*, 453 U.S. 322, 329-31, 101 S.Ct. 2789, 2794-95 (1981). ("[N]othing in the language of §302(c) (5) reveals any congressional intent that a trustee should or may administer a trust fund in the interest of the party that appointed him. ...")

According to this Court, the same rule of independence is forced on the trustees and their funds by ERISA:

> Section 404(a) (1) of ERISA requires a trustee to "discharge his duties ... solely in the interest of the participants and beneficiaries. ..." 29 U.S.C. §1104(a) (1).[15] Section 406(b) (2) declares that a trustee may not "act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." 29 U.S.C. §1106(b) (2). Section 405(a) imposes on each trustee an affirmative duty to prevent every other trustee of the same fund from breaching fiduciary duties, including the duty to act solely on behalf of the beneficiaries. 29 U.S.C. §1105(a).

Id. at 332-33, 2796.[8]

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[8] Footnote 15 referred to the ERISA definitions of beneficiaries and participants which excludes any reference to the union or employer. §2(7) and (8) of ERISA, 29 U.S.C. §1002(7) & (8).

The same fiduciary principles apply to the fund as an entity. Thus, the NLRB's reliance upon the Funds' activities as evidence of the *Union's* enforcement of the contract is in error as a matter of law because the Funds cannot act as the "agent" for the Union and at the same time comply with both the LMRA and ERISA. "[U]nions are involved with the trust authorities only to the extent of selecting half of the trustees." *Waggoner v. Dallaire,* 649 F.2d at 1368.

The court in *Waggoner* reversed the district court's holding that the union's business agent's observation of contract violations was effective notice to the funds:

> As a matter of federal law, a union and its representatives are not agents of a trust fund created by a collective bargaining agreement. Trust authorities set up pursuant to section 302 of the LMRA have long been held to constitute a distinct and independent entity separate from the union that negotiates the collective bargaining agreement establishing a trust. *See Lewis v. Benedict Coal Corp.,* 361 U.S. 459, 465-71, 80 S.Ct. 489, 493-496, 4 L.Ed.2d 442 (1960). These trust authorities by law have no authority to direct union activities, and unions are involved with the trust authorities only to the extent of selecting half of the trustees. Section 302(c) (5) of the LMRA, 29 U.S.C. §186(c) (5).

Id. at 1368.

The LMRA and ERISA ensure that the trust and its trustees remain independent of the parties who create (union and employer) and contribute (employer) to the trust in order to ensure that the parochial concerns of the parties are separated

from the parties' mutual agreement that the trust benefit the designated beneficiaries. *NLRB v. Amax Coal Co., Etc.*, 453 U.S. at 329-34, 101 S.Ct. at 2794-96. (Discussion of legislative history of LMRA §302 and ERISA.) In the instant case, however, the NLRB is relying upon the fiduciary responsibilities of the trustees (ERISA §403-04, 29 U.S.C. §1103-04) to establish that the Union, a separate and distinct legal entity from the Funds, was actively enforcing the terms of the alleged contract.

The NLRB and Second Circuit decisions raise an important issue of federal law "which has not been, but should be settled by this Court. ..." U.S. Sup.Ct. Rule 10.1(c): May the NLRB rely upon the actions of LMRA/ERISA-governed Funds for its resolution of a labor law dispute concerning the existence of a contract between an employer and a union? In addition to raising a question of federal law to be settled by this Court, the Second Circuit's enforcement order, while not a precedent, conflicts with the decisions of other courts of appeals. *Id.* Rule 10.1(a).

B. In Only Limited Circumstances May the Funds' Serve as the Agent for Both the Union and Employer.

Benefit funds may be the agent for the limited purpose of receiving contributions. For example, in *NLRB v. Clerks and Checkers Local No. 1593, Int'l Longshoremen's Association, AFL-CIO*, 644 F.2d 408, 411 (5th Cir. 1981), *enforcing*, 243 NLRB (No. 3) 8, 101 LRRM 1348 (1979), the court stated: "This limited agency of the Fund to receive contributions does not conflict with common law principles relating to fiduciaries or with ERISA provisions requiring that trustees of such a fund not be subject to the control of any other person

or organization". This is a strictly limited "agency" that cannot serve to establish the existence of the collective bargaining agreement.

The courts have rejected the NLRB's attempts to extend the agency to other matters:

> It is generally agreed that both agents and trustees are fiduciaries, but there are significant differences between the two. An agent acts for and on behalf of his principal and subject to his control. A trustee acts for the benefit of the beneficiaries of the trust; he is an agent only if he agrees to hold title for the benefit *and subject to the control* of another. Restatement 2d, Agency §14B; Restatement 2d, Trusts §8. Unless the Union can be said to have control of the operations of the Trust, the Trust should not be treated as the Union's agent.

NLRB v. United Brotherhood of Carpenters & Joiners of America, Local #1913, AFL-CIO, 531 F.2d 424, 426-27 & n.1 (9th Cir. 1976) (emphasis in original) (Multiemployer benefit fund subject to LMRA §302(c) (5) and ERISA.)

Were the union "to have control of the operations of the Trust", *id.*, the trust would violate LMRA §302(c) (5) and ERISA §403. Thus the NLRB's attempts to find and apply a common law "agency" relationship between benefit funds and unions has been rejected. *See also Waggoner v. Dallaire, supra.*

The record in this case does not support even a limited agency because where, as here, the principals (Brower's and the Union) disagree over the agent's (the Funds) conduct (the

enforcement of the alleged contract) there can be no agency. *In Re Shulman Transport Enterprises, Inc.*, 744 F.2d 293, 295 (2d Cir. 1984) ("An essential characteristic of an agency relationship is that the agent is subject to the principal's direction and control.")

As a matter of law, the activities of the Funds in pursuit of their statutory and fiduciary obligations cannot be usurped by the delinquent Union and relied upon by the NLRB as evidence of the Union's enforcing its alleged contracts with Brower's. The Funds, which could only have been an agent for both Brower's and the Union must be shown to act "for the benefit of, with the knowledge and consent of, and under some control by" the principals. *E.g. Grove Press, Inc. v. Angelton*, 649 F.2d 121, 122 (2d Cir. 1981). No such showing has been made, and it is ludicrous to even consider that it could exist on the record in this case because of the conflicting interests of the potential principals. Therefore, the NLRB exceeded its mandate by relying on the actions of the Funds to find that the Union sought to enforce the alleged contract.

POINT IV

WHERE THE UNION ABANDONED THE RESPONSIBILITY TO INITIATE BARGAINING, IT CANNOT THEREAFTER ACCUSE THE EMPLOYER OF VIOLATING THE EMPLOYER'S STATUTORY DUTY TO BARGAIN.

Both the NLRB and the Second Circuit failed to address Brower's' contention that the Union's failure to demand bargaining or even contact Brower's to discuss the alleged breaches warranted the dismissal of the complaint (Appendix C at 4).

A. The §8(a) (5) charge cannot be sustained in the absence of any evidence that the Union demanded bargaining.

The record in this case is bereft of any evidence that the Union in the past twenty years demanded that Brower's bargain over or comply with any of the provisions of any alleged agreement. (Appendix B at 19, 26.) In fact, just the opposite is in evidence. In the past twenty years the Union never collectively negotiated a bargaining agreement with Brower's or its agent nor demanded bargaining or compliance with any specific provision of any agreement. (A: 78, 227, 239-40, 252-57, 291-93, 298-301). In the absence of the General Counsel introducing any evidence that the Union demand negotiations or that Brower's refused a request from the Union to bargain, the Union's charge cannot be sustained.[9]

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[9] That Brower's' actions were unilateral is not *per se* a refusal to bargain. *NLRB v. Cone Mills Corp.*, 373 F.2d 595, 599 (4th Cir. 1967). Only where the record establishes that any demand would have been futile, may a refusal to

(footnote continued)

It is well settled that in the absence of a demand, a refusal to bargain charge cannot be sustained. *NLRB v. Columbian Enameling & Stamping Co., Inc.*, 306 U.S. 292, 59 S.Ct. 501 (1939). (The union never requested negotiations or even expressed its willingness and desire to the employer to meet and negotiate.) This case presents a more compelling set of facts than those of *Columbian Enameling* simply because the historical record, not just the operative period of the NLRB's Complaint (A:5, ¶9(a)), is bereft of any evidence that the Union even communicated with Brower's.[10] In the absence of this *prima facie* showing, the complaint should have been dismissed.

The NLRB has unsuccessfully attempted to restrict *Columbian Enameling* to instances where the employer is closing down its facility. *See e.g. White Consolidated Industries, Inc.*, 154 NLRB (No. 127) 1593, 60 LRRM 1147 (1965) (No §8(a) (5) violation because union never requested bargaining over the decision to terminate the employer's operation.) But as discussed below, the courts, and even the NLRB on occasion, have not settled on such a narrow application of *Columbian Enameling*.

(footnote continued)

bargain be inferred. *Insulating Fabricators, Inc.*, 144 NLRB (No. 125) 1325, 1332, 54 LRRM 1246, 1248 (1963). The NLRB made no such finding and since there is no history of bargaining, any such inference is inappropriate. There is simply nothing in the record to indicate that a demand by the Union would have been futile.

[10] Indeed, the ALJ held that the fact that the Union made no attempts to enforce the collective bargaining agreements established that the Union abandoned the contract. (Appendix B at 26 n.3)

B. Both the NLRB and the Second Circuit Ignored Their Precedents Requiring the Union to Demand Bargaining Before a Refusal to Bargain Charge May be Sustained.

The principle of failing to demand bargaining stands apart from the particular issue over which bargaining is allegedly refused. In *American Buslines, Inc.*, 164 NLRB (No. 136) 1055, 65 LRRM 1265 (1967), the NLRB dismissed the complaint (citing to *Columbian Enameling)* holding that the union's contenting itself with a mere protest over promotions and the filing of an unfair labor practice charge did not meet the union's obligation to demand bargaining. *Id.* at 1267. The essential point was that the union "failed to prosecute its right" to demand negotiations and as a result the employer could not be charged with a violation of §8(a) (5) of the Act.

The instant case was even more compelling for dismissal of the complaint because Brower's not only concealed nothing from the Union (Appendix B at 26) or its employees with Union backgrounds (A:307), but the Union was well aware of Brower's noncompliance over the years and did nothing about it. The Union did not even attempt a half-hearted protest as in *American Buslines*. If anything, the Union concealed itself from Brower's and misled it by never appointing a shop steward or even sending a delegate to the premises over the past thirty years. A union cannot charge an employer with a failure to observe its rights when by its conduct and practice over a thirty year period the union claims no rights nor demands that any be observed. The employer is justified in believing that some arrangement exists between itself and the union, but that it certainly is not a collective bargaining relationship in which the employees' interests are represented.

Moreover, the Second Circuit itself has refused to enforce an NLRB order where the union failed to demand bargaining over unilateral technological changes. *Island Typographers, Inc.*, 252 NLRB (No. 3) 9, 105 LRRM 1455 (1980), *enf. den., NLRB v. Island Typographers, Inc.*, 705 F.2d 44 (2d Cir. 1983). Citing to *Columbian Enameling, American Buslines, Inc., International Offset Corp.*, 210 NLRB (No. 140) 854, 86 LRRM 1305 (1974) and *NLRB v. Spun-Jee Corp.*, 385 F.2d 379, 383-84 (2d Cir. 1967) (failure to request bargaining is waiver of rights), the Second Circuit stated: "Both the Board and this Court have recognized that a union cannot simply ignore its responsibility to initiate bargaining over subjects of concern and thereafter accuse the employer of violating its statutory duty to bargain." 705 F.2d at 51. *See also W.W. Grainger, Inc. v. NLRB*, 860 F.2d 244, 249 (7th Cir. 1988) ("We agree with the Second Circuit Court of Appeals that, 'a union cannot simply ignore its responsibility to initiate bargaining over subjects of concern and thereafter accuse the employer of violating its statutory duty to bargain.' *Island Typographers*, 705 F.2d at 51.") Thus, the decision of the Second Circuit in this case is inconsistent with its own precedent.

The writ of certiorari should be granted because both the NLRB and the Second Circuit ignored their precedents as well as those of this Court which required the Union to demand bargaining. U.S. Sup.Ct. Rule 10.1(c).

POINT V

THE NLRB MISAPPLIED ITS PRECEDENTS TO CONCLUDE THAT BROWER'S AND THE UNION INTENDED TO HAVE A COLLECTIVE BARGAINING RELATIONSHIP.

The NLRB attempts to distinguish the cases relied upon by its ALJ, *Ace-Doran Hauling & Rigging Co.*, 171 NLRB (No. 88) 645, 68 LRRM 1298 (1968), *Glenlynn, Inc. d/b/a, McDonald's Drive-In Restaurant*, 204 NLRB (No. 45) 299, 83 LRRM 1356 (1973), *Weber's Bakery*, 211 NLRB (No. 3) 1, 86 LRRM 1421 (1974), and *Bender Ship Repair Co., Inc.*, 188 NLRB (No. 86) 615, 77 LRRM 1007 (1971), by contending that the contract in the instant case was unambiguous and that the Union enforced it. (Appendix B at 5-7.) The attempt to distinguish the cases in which agreements were similarly signed over the years is really an attempt to redecide them or to depart from existing NLRB rules.

For example in *Ace-Doran Hauling* the dispositive factor, ignored by the NLRB in the instant case, was that the practices of the employer and union established that there was no intention by either party to enter into or maintain a collective bargaining relationship:

> The evidence relating to the practice under the agreements further makes it clear that the parties did not intend them to be effective collective-bargaining contracts, but instead merely regarded them as arrangements under which Respondent agreed to check off dues, health and welfare, and pension payments for Union members only. The acquiescence of the Unions in Respondent's failure both to

> enforce the union-security provisions of the agreements and to pay health and welfare contributions for all employees, (as ostensibly provided in the 'Contracts') makes it clear that the parties did not believe they were in true collective-bargaining relationships.

171 NLRB at 646, 68 LRRM at 1299.

Similarly, in this case the parties over the years signed contracts, never bargained, failed to comply with key contract terms, but continued an "arrangement" covering on occasion a couple of employees and the Brower family. (The Brower family members are not "employees" within the meaning of §2[3] of the Act, 29 U.S.C. §152[3]). Since Brower's' introduction to the Union in 1951, there is no evidence that the parties ever intended to have a collective bargaining relationship.

Bender Ship Repair presents a more compelling case for dismissal of the complaint to the extent that the NLRB recognized that the units were defined and it was able to state that "[t]he record lacks evidence of majority status by the Union in any appropriate unit at any critical date. ..." 188 NLRB at 615, 77 LRRM at 1008 n.2. The NLRB then held that "it is evident from the practice under this and earlier contracts that the parties had no intention of entering into a real collective-bargaining relationship." *Id.* at 616, 1009. *See also Glenlynn, Inc.*, 204 NLRB at 309 ("the record is devoid of independent evidence of the Union's majority status in [the] unit. ...") Yet the NLRB simply ignores its precedents without regard to its obligation as an administrative agency to provide a reviewing court with a basis to "judge the consistency of that act with the agency's mandate." *Atchison, Topeka & Santa Fe Railway*

Co. v. Witchita Board of Trade, 412 U.S. 800, 808, 93 S.Ct. 2367, 2375 (1973).

The NLRB's attempt to distinguish *Weber's Bakery* is absurd because in that case it found that the unit was not ill-defined and instead relied upon the fact that "the parties' practice under the agreement showed they did not intend a real collective bargaining agreement" to reject the union's majority status. (Appendix B at 6 n.10.) Thus, the NLRB should be following *Weber's Bakery* in the instant case because for thirty plus years the Union knew of Brower's' noncompliance and yet never sought to enforce the terms of the successive contracts. The contracts were a "sham." *(See also Glenlynn, Inc.*, 204 NLRB at 308-09; *NLRB v. West Sand & Gravel Co.*, 612 F.2d 1325 (1st Cir. 1979) (Application of decisions to case identical to Brower's.)

The NLRB further attempts to distinguish and depart from the application of its *Ace-Doran* line of decisions by holding that the presumption of majority status is irrebuttable by citing to *Mr. Clean of Nevada, Inc.*, 288 NLRB No. 101, 130 LRRM 1345 (1988) and *Pioneer Inn Assoc.*, 288 NLRB No. (160) 1263, 95 LRRM 1225 (1977).[11] Again, the distinctions fail.

Pioneer Inn concerned the issue of union defunctness

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[11] The NLRB's decision is inconsistent on this point. It states that an "incumbent union generally enjoys a presumption of continued majority status" (Appendix B at 5)—a rebuttable presumption—but then declares the presumption irrebuttable. *Id.* at 8. Furthermore, in *Shamrock Dairy, Inc.*, 124 NLRB (No. 63) 494, 44 LRRM 1407, 1408 (1959) the NLRB stated there was no evidence to rebut the presumption. Why would the NLRB refer to a lack of rebutting evidence if the presumption was irrebuttable? Either *Shamrock* should be overruled or the presumption is rebuttable.

which was not an issue in the instant case. Here, with the exception of the charge it filed, the Union has not performed a single act demonstrating any interest in representing Brower's employees. *Pioneer* is therefore both factually and conceptually inapposite because the dispositive factors in *Pioneer* were that after a five year period of inertia from the Union, the Union "resumed its role" representing the employees by processing a grievance, by protesting unilateral changes in the medical plan and by demanding negotiations to "amend and modify" its contract. These facts are critical because they establish that the union administered its contract and that the employer appears to have been otherwise in compliance—evidence of a collective bargaining relationship. The NLRB hung its hat in *Pioneer* on the ALJ's findings that the Union *was active* in the critical period:

> [T]he ... conduct alleged by the General Counsel to be violative of Section 8(a) (5) and (1) of the Act took place subsequent to June 1974, and, in fact, subsequent to January 1975, the time specified by the Administrative Law Judge when the Union "commenced to represent the unit employees and to administer the collective-bargaining agreement."

228 NLRB at 1263, 95 LRRM at 1226.

While in *Brower's* the contract also was signed, the latter two critical elements—negotiations and processing grievances —are absent. The only activity in the instant case by the Union is the filing of the charge that: "During the past six months, the Employer has failed and refused to apply its collective bargaining [sic] with the Union." (A: 1.) The irony of the charge is that it implies that the Union checked whether there was compliance and then asked (hence "refusal")

Brower's to comply. There is no evidence in the record that the Union lifted its finger to do even these Acts. *Pioneer Inn*, a defunctness case, was simply misapplied by the NLRB. The Second Circuit failed to address the NLRB's error in enforcing the order.

The decision in *Mr. Clean* is also both factually and legally inapposite because the union in *Mr. Clean* met with Mr. Clean's officer and discussed both the initial and renewal contracts with him. (ALJ Decision pp. 15-19 describes the disputed circumstances concerning the execution of both contracts.) Additional critical distinctions between *Brower's* and *Mr. Clean*, ignored by the NLRB, are that the union in *Mr. Clean* grieved discharges and signed up new employees. (ALJ Decision at 3, 19.) There is no conduct more consistent with a union's desire to represent the employees of an employer than signing-up new members. In *Brower's*, there is no evidence of contact between Brower's and the Union for over twenty years.

Moreover, and in sharp contrast with Brower's, Mr. Clean repudiated its contract *while* the union demanded bargaining, signed up new members and grieved discharges which is evidence that the union was affirmatively exercising its contractual rights in behalf of the employees it represented. None of these facts essential to the outcome in *Mr. Clean* are present in *Brower's*. Except for the filing of the unfair labor practice charge there has been only silence from the Union for the past twenty years.[12] The facts in this case do not permit the appli-

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[12] The NLRB cited the single instance of the Union requesting an updated seniority list in 1983 (A;169, 211-13) as evidence of the Union's enforcement. (Appendix B at 7.) The letter, however, was a form mass mailed to all employers.

cation of the NLRB's *Pioneer Inn* and *Mr. Clean* precedents.[13]

Nevertheless, the NLRB is attempting to have it both ways —retaining its precedents but rejecting the outcome they require. The facts in the NLRB "precedents" and the instant case are indistinguishable on the central question whether the parties evinced any intention to maintain a collective bargaining relationship. The NLRB erroneously failed to follow those precedents.

If the NLRB is to be supported in its departure from precedents, then it must at the very least establish that it is being consistent with the mandate of the Act. *Cf. Atchison & Topeka Etc. v. Witchita Board of Trade, supra.* Here, the NLRB does not assert such a departure. Therefore, its actual departure is an abuse of discretion which the Second Circuit erroneously reviewed under a deferential standard. *See Oil, Chemical & Atomic Workers Int'l Union Etc. v. NLRB,* 842 F.2d 1141, 1143 n.1 (9th Cir. 1988).

The actions of the NLRB and Second Circuit warrant review by this Court to the extent that they are inconsistent with the precedents of this Court requiring an administrative agency to follow its precedents, explain any departures therefrom and remain consistent with the mandate of its enabling act. The result in this case, thus far, is that the NLRB, with the acquiescence of the Second Circuit, is arbitrarily forcing a

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[13] An additional distinction is that in *Brower's* there was no deception (Appendix B at 26). *Contr. Mr. Clean,* Decision and Order at 2, n.4. Moreover, any inference of deception here is unsupportable because deception requires contact, communication or avoidance, none of which took place between Brower's and the Union even though certain Brower's employees were Union members at one time. (A:307-08.)

union on an employer's employees without any evidence that the union ever established having their support, has it now, or has a valid legal basis for an inference being drawn that such support exists.

CONCLUSION

The petition for a writ of certiorari should be granted. The Second Circuit erroneously applied a deferential standard of review permitting the NLRB to ignore its precedents as well as exceed the parameters of its Congressional mandate.

In addition, both the NLRB and the Second Circuit erred by relying upon the activities of LMRA/ERISA-governed Funds as evidence of the Union's intent and actual enforcement of its contracts. Not only is this a question of federal law that should be settled by this Court, but the Second Circuit's order conflicts with the precedents of other courts of appeals and this Court. U.S.Sup.Ct. Rule 101.(a), (c).

Dated: Carle Place, New York
November 23, 1990

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

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At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of August, one thousand nine hundred and ninety.

PRESENT:
HONORABLE WILFRED FEINBERG
HONORABLE RICHARD J. CARDAMONE
Circuit Judges
HONORABLE JOSE A. CABRANES*
District Judge

UNITED STATES COURT OF APPEALS
FILED AUG 29 1990
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

90-4031

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*Honorable Jose A. Cabranes, United States District Judge for the District of Connecticut, sitting by designation.

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NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

LOCAL 814, AFIILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO,
Intervenor,

against

BROWER'S MOVING & STORAGE, INC.

Respondent,

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Petition for enforcement of an order of the National Labor Relations Board.

This cause came on to be heard on the application of the National Labor Relations Board for enforcement of its Decision and Order, dated November 8, 1989, and was briefed and argued by counsel.

UPON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed that the order of the Board be and it hereby is ENFORCED.

1. The National Labor Relations Board seeks to enforce its order, dated November 8, 1989, against Brower's Moving and

Storage, Inc., a Port Washington, New York business, which, among other things, directed Brower's to comply with the terms and conditions of its 1986-89 collective bargaining agreement with Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. The Board decided, in disagreement with the ruling of the Administrative Law Judge, that Brower's violated Section 8(a)(5) and (1) of the National Labor Relations Act by repudiating the terms of its collective bargaining agreement with the Union and by failing to make the contractually required contributions to employee Welfare, Pension and Annuity Funds since April 11, 1988. It should be noted that this Court recently affirmed the grant by the United States District Court for the Eastern District of New York of summary judgment against Brower's in an action by the Trustees of the Funds, ordering Brower's to make unpaid pension contributions to the Funds. Benson, Corbett, Eisenberg, Morgan & O'Connor v. Brower's Moving & Storage, Inc., No. 90-7001 (2d Cir. June 18, 1990).

2. Citing such cases as NLRB v. Marine Optical Associates, 671 F.2d 11, 16 (1st Cir. 1982), Pioneer Inn Associates v. NLRB, 578 F.2d 835, 838-39 (9th Cir. 1978) and NLRB v. Marcus Trucking Co., 286 F.2d 583, 592-93 (2d Cir. 1969), the Board argues that Brower's was not legally justified in challenging the incumbent Union's majority status and dishonoring its agreement because, during the term of a collective bargaining agreement of three years or less, the incumbent union is entitled to a presumption of majority status. The Company apparently does not dispute this proposition; instead, relying principally on Ace-Doran Hauling & Rigging Co., 171 NLRB 645, 646 (1968), it claims that his presumption does not apply here because the conduct and practice of

the parties shows that they did not intend their agreement to function as an effective collective bargaining contract. Brower's alleges that the Union's actions subsequent to its initial agreement in 1951 indicate that the Union either abandoned the contract or acquiesced in the Company's repudiation of it. The Board, however, found on the record before it that the parties' conduct over a period of years did not negate the intent to form a valid collective bargaining agreement or establish that the Union abandoned the contract or acquiesced in repudiation of it.

3. We find that the Board's findings of fact are supported by substantial evidence on the record as a whole and therefore must be affirmed. The Board made a number of findings confirming the parties' intent to form a valid, ongoing collective bargaining relationship, including the Company's assent to successive agreements over a period of many years, its payment of dues and contributions for several employees over a substantial period of time and the Union's efforts on behalf of employees in a number of instances to secure affirmative compliance with the contract.

4. We have considered all of the Company's arguments and find them without merit. We grant the Board's application to enforce its order.

WILFRED FEINBERG

RICHARD J. CARDAMONE
Circuit Judges

JOSE A. CABRANES,
District Judge

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

APPENDIX B

297 NLRB No. 28
SCH
D—1027
Port Washington, NY

Case 29—CA—13733

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BROWER'S MOVING & STORAGE, INC.

and

LOCAL 814, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO

DECISION AND ORDER

On April 11, 1989, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent and the Acting General Counsel filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with the Decision and Order.

The complaint alleged that the Respondent violated Section 8(a)(5) and (1) by repudiating and failing to honor the terms of its collective-bargaining agreement with the Union and by failing to make the required contributions to the Teamsters Local 814 Welfare, Pension and Annuity Funds (the Funds), covering the employees in the following appropriate unit:

> All chauffeurs, warehousemen, packers, hi-low operators, checkers and helpers employed at the Respondent's warehouse, excluding guards and supervisors as defined in Section 2(11) of the Act.

The judge dismissed the complaint. Relying primarily on *Ace-Doran Hauling & Rigging Co.*[2] and *McDonald's Drive-In Restaurant,*[3] the judge found that the collective-bargaining agreement between the parties did not give rise to a presump-

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[1] We shall set forth the facts that the judge failed to mention, which support asserting jurisdiction over the Respondent. The Respondent, a New York corporation with an office and place of business at its warehouse located at 18 Avenue A, Port Washington, New York, is engaged in the warehousing, moving, and storage of household and commercial furniture and other items. The Respondent, during the 12-month period ending November 30, 1988, which is a representative period, in the course and conduct of its business had gross revenues in excess of $500,000. During the same 12-month period, the Respondent purchased and received at its warehouse goods and material valued in excess of $50,000 directly from sources located outside the State of New York. We find that the Respondent is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[2] 171 NLRB 645 (1968).

[3] 204 NLRB 299 (1973). The judge also cited *Weber's Bakery,* 211 NLRB 1 (1974), and *Bender Ship Repair Co.,* 188 NLRB 615 (1971).

tion of majority status. He concluded that the agreement was invalid because the parties' practice under the agreement demonstrated that they did not intent to established a valid collective-bargaining relationship. We disagree with the judge's failure to find a violation for the following reasons.

The Respondent recognized the Union in 1951 after it demanded recognition. The Respondent admits signing successive collective-bargaining agreements over the years, although there were never any individual negotiations. Most recently, the Respondent agreed to be bound by the 1986 to 1989 collective-bargaining agreement between the Union and an employer association of which the Respondent is not a member. The agreement states that it covers employees classified as chauffeurs, warehousemen, packers, hi-low operators, checkers, and helpers. Although the Respondent has never established the specific job classifications described in the contract, it has employees who perform many of the functions included in those classifications.

It is undisputed that over the years the Respondent failed to honor and abide by the wage, holiday, vacation, union security, and other provisions of the successive agreements. There is no affirmative evidence that the Union was aware of these lapses other than failure to pay into the Funds until the instant unfair labor practice charge was filed. From 1951 to 1954 a union representative visited the Respondent's facility on a monthly basis to collect dues. No grievances were ever filed and no steward was appointed, and after 1954 no union representative visited the Respondent's facility.

Over the years the Union's Funds sent the Respondent monthly contribution remittance reports. Until 1968 the Re-

spondent made Fund contributions only on behalf of a few family members employed by the Respondent, despite the fact that the Respondent employed other individuals in the unit described in the contract. The Respondent had contributed to the Funds on behalf of Wesley Brower until 1956 when the Union informed him that, because he was an owner of the Respondent, he could not work on trucks with members of the bargaining unit.

In 1968, the Respondent contacted the Union about getting an employee "set up" with hospitalization coverage and other benefits. In March 1982 the Respondent paid the back dues and Fund contributions that the Union required in order for the employee to be eligible. The parties settled a 1981 suit brought by the trustees of the Funds for delinquent contributions for the period July 1975 to January 1981. In September 1987, the Respondent ceased making any Fund contributions. In December 1987, the Funds conducted an audit of the Respondent's payroll records and found a sizeable delinquency in contributions due from April 1983 through September 1987. The Funds regularly sent past due notices to the Respondent on a monthly basis showing delinquencies dating back to 1981. The Respondent did not respond to bills for the delinquency, and the Funds filed suit.

By letter dated October 14, 1983, the Union requested all employers with collective-bargaining agreements, including the Respondent, to submit an updated seniority list. This request was made pursuant to a provision of the collective-bargaining agreement. The Respondent replied by sending the Union a letter listing some family members who worked for it. At that time the Respondent also requested that the Union provide it with the dates of entry and years of credit for the

few family members that the Respondent had listed in its response. The Union responded by submitting this information to the Respondent. It appears that the Respondent, in actuality, employed more unit employees than those listed in its response and never informed the Union of the existence of these additional employees. On October 11, 1988, the Union filed the charge herein.

We find that since 1951, the Union has been the designated exclusive collective-bargaining representative of the employees in the unit described in the complaint, which we find appropriate for collective bargaining, and that the Union has been recognized as such by the Respondent. Since 1951 such recognition has been embodied in successive collective-bargaining agreements between the Respondent and the Union, the most recent of which is effective by its terms for the period April 1, 1986, to March 31, 1989. The Respondent has repudiated and, by its own admission, failed to honor and abide by the wage, vacation, holiday, union security, and other provisions of its agreement with the Union. We find that, since April 11, 1988, by this conduct, the Respondent has violated Section 8(a)(5) and (1) of the Act. We further find that the Respondent has since April 11, 1988, violated Section 8(a)(5) and (1) by failing to make the contractually required contributions to the Union's Funds.[4]

We reject the Respondent's contention and the judge's finding that there is no valid collective-bargaining agreement and that the Union was not supported by a majority of the employees in an appropriate unit. We find that the cases relied on by the judge are distinguishable. As the judge noted, it is well-established in Board Law that an incumbent union generally

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[4] *Mr. Clean of Nevada*, 288 NLRB No. 101 (May 11, 1988).

enjoys a presumption of continued majority status during the term of a collective-bargaining agreement. In *Ace-Doran Hauling & Rigging Co.*, supra, the Board found a narrow exception to that general rule when two factors undermined the validity of the contract and the presumption of majority status. First, the Board found that the unit was not defined with sufficient clarity "to warrant a finding that the contracts are ones to which a presumption of majority status can attach."[5] Second, the Board found that both parties' practice under the agreements showed that the parties did not intend them to be effective collective-bargaining agreements, but merely arrangements to check off dues and to procure benefits for union members only.[6] Similarly, in *Bender Ship Repair Co.*, supra, the Board found a "patent ambiguity"[7] in the contractual unit definition and that the union acquiesced in the application of the contract to only a few favored employees.[8] In *McDonald's Drive-In Restaurant*, supra,[9] the Board adopted the judge's finding that the unit purported to be covered by the contract was ambiguous and that the union never bothered to enforce its contract.[10]

The aforementioned cases are distinguishable because the collective-bargaining agreement in this case suffers from no

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[5] 171 NLRB at 645.

[6] Id. at 646.

[7] 188 NLRB at 615.

[8] Id. at 616.

[9] 204 NLRB 299, 309 (1973).

[10] The judge also cited *Weber's Bakery*, supra. In that case the board adopted the judge's finding that, although the unit definition in the contract was adequate to support the contract's validity, the parties' practice under the agreement showed that they did not intend a real collective-bargaining relationship and, therefore, the presumption of majority status did not attach. The judge in *Weber's Bakery* found that the contract was a sham and that the Union acquiesced in, at most, token compliance with the contract.
211 NLRB at 12.

such infirmities. It clearly specifies the unit, and the judge specifically found it was not a "members only" contract. In addition, the Union has clearly taken affirmative steps to enforce its contract over the years. When the contract was first signed, a union representative went to the facility to sign up employees and thereafter visited monthly for 3 years to collect dues. In 1956 the Union sought to stop the Respondent's owner, Wesley Brower, from performing unit work. In 1968 the Union responded to the Respondent's request to sign up one of its employees and required that the Respondent comply with the contract by paying back dues and benefit contributions to the employee's date of hire. In 1983, the Union requested that the Respondent submit an updated seniority list. Moreover, the activity of the Funds in filing suit in 1981 and in auditing the Respondent's books and records in 1987 and instituting another suit for the delinquencies discovered is consistent with a finding that there was in existence a valid enforceable collective-bargaining agreement between the parties.

While no steward was appointed and no grievances filed, the Respondent admitted it never told its unit employees they were represented by the Union or that there was an applicable contract. Therefore, the employees were denied the knowledge necessary to seek assistance from the Union. And, as discussed earlier, the Union was also denied knowledge concerning the unit employees when it asked for it. The Union filed the charge herein in October 1988 and has actively pursued it.

Thus, we find that there is no evidence that the Union ever acquiesced in a repudiation of substantial portions of the contract or that the Union and the Respondent ever had an ar-

rangement or understanding that would negate an intent to enter into a valid collective-bargaining relationship.[11]

Accordingly, we find that the 1986-1989 contract is valid and gives rise to an irrebutable presumption of majority status and that the Union has not abandoned its administration of the contract. We further find that the Respondent has violated Section 8(a)(5) and (1) of the Act by repudiating and failing to comply with the contract's terms and by failing to make the required Fund contributions.[12]

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[11] *KBMS, Inc.*, 278 NLRB 826, 846 (1986).

We note that the Respondent itself has engaged in conduct that is inconsistent with its position that there is no valid contract. It has signed successive agreements over a period of 36 years and paid dues and made benefit contributions pursuant to those collective-bargaining agreements for several employees over a substantial part of that time. In 1968 the Respondent called on the Union to sign up an employee so he could receive union benefits, and it complied with the Union's requirement to pay back dues and benefits for that employee so that employee would be eligible.

We also reject the Respondent's contention that the contract is not valid because the Union lacked majority status at the time of the initial recognition in 1951. The Board has held:

> [A]n employer may not defend against a refusal-to-bargain allegation on the basis that the original recognition, occurring more than 6 months before charges had been filed in the proceeding raising the issue, was unlawful. Any such defense is barred by Section 10(b) of the Act.

Morse Shoe, Inc., 227 NLRB 391, 394 (1976), and the cases cited therein. *Mr. Clean of Nevada*, supra. Even if the initial recognition in 1951 were flawed, it is outside the 10(b) period, and the Resondent is precluded from attacking the current contract on that basis.

[12] *Mr. Clean of Nevada*, supra, *KBMS, Inc.*, supra; *Pioneer Inn & Pioneer Inn Casino*, 228 NLRB 1263 (1977), enfd. 578 F.2d 835 (9th Cir. 1978).

We reject the Respondent's contention and the judge's finding that the Union has abandoned the contract and the unit. As the Board stated in *Pioneer Inn*, supra at 1264:

> [T]he lack of any basis for finding the contract to be invalid calls into effect the long-established Board presumption of the Union's majority status during the term of the contract, irrespective of the degree to which the Union may or may not have been deficient in the adminis-

(Footnote continued)

Conclusions of Law

1. Brower's Moving & Storage, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All chauffeurs, warehousemen, packers, hi-low operators, checkers and helpers employed by Brower's Moving & Storage, Inc., at its Port Washington, New York facility, excluding guards and supervisors as defined in the Act.

4. Since April 11, 1988, the Respondent has violated Section 8(a)(5) and (1) of the Act by repudiating and failing to honor or abide by the terms of its collective-bargaining agreement with the Union, and by failing to make the required Fund contributions.

5. The above-described violations of the Act constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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tration of that agreement.

To preserve the validity of a contract for contract bar purposes, a recognized union need only show that it is willing and able to represent the covered employees at the time its status is called into question. *Loree Footwear Corp.*, 197 NLRB 360 (1972); *Road Materials*, 193 NLRB 990, 991 (1971). There is no evidence that the Union is either unwilling or unable to represent the Respondent's employees covered by the contract.

The Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Specifically, we shall order the Respondent to honor and abide by the terms of its collective-bargaining agreement with the Union, to make the unit employees whole for any losses they may have suffered because of the Respondent's failure to abide by the terms of the agreement, for the period beginning April 11, 1988, to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and to remit the contributions required by the agreement for the period beginning April 11, 1988, to the Union's Funds, with interest to be computed according to the practice set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 126 fn. 7 (1979). The Respondent shall also reimburse its employees for any expenses ensuing from its failure to make contributions to the Funds, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981).

ORDER

The National Labor Relations Board orders that the Respondent, Brower's Moving & Storage, Inc., Port Washington, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Repudiating and failing to honor and abide by the terms of its collective-bargaining agreement with the Union covering the employees in the following unit:

> All chauffeurs, warehousemen, packers, hi-low operators, checkers and helpers employed by Brower's Moving & Storage, Inc., at its Port Washington, New York facility, excluding guards and supervisors as defined in the Act.

(b) Failing to make pension, welfare, and annuity Fund contributions as required by its collective-bargaining agreement with the Union for the unit employees described above.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Honor and abide by the terms of its collective-bargaining agreement with the Union.

(b) Make whole all unit employees for any losses they may have suffered as a result of the Respondent's refusal to honor the terms of its collective-bargaining agreement for the period beginning April 11, 1988, in the manner described in the remedy section of this decision.

(c) Make whole the Union's Funds for any payments the Respondent failed to make for the period beginning April 11, 1988, in the manner described in the remedy section of this Decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of reimbursements due.

(e) Post at its Port Washington, New York facility copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. November 8, 1989

James M. Stephens, Chairman

Mary Miller Cracraft, Member

John E. Higgins, Jr. Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT repudiate or fail to honor and abide by the terms of our collective-bargaining agreement with Local 814, International Brotherhood Of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO covering the employees in the following unit:

> All chauffeurs, warehousemen, packers, hi-low operators, checkers and helpers employed by Brower's Moving & Storage, Inc., at its Port Washington, New York facility, excluding guards and supervisors as defined in the Act.

WE WILL NOT fail to make pension, welfare, and annuity Fund contributions as required by our collective-bargaining agreement with the Union for the employees described above.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL honor and abide by the terms of our collective-bargaining agreement with the Union.

WE WILL make whole all unit employees for any losses they may have suffered as a result of our refusal to honor the terms of our collective-bargaining agreement from April 11, 1988, with interest.

WE WILL make whole the Union's Funds for any payments we failed to make from April 11, 1988, with interest.

BROWER'S MOVING & STORAGE, INC.

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 75 Clinton Street, Eighth Floor, Brooklyn, New York 11201-0001, Telephone 718-330-2862.

JD(NY)-30—89
Port Washington, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

Case No. 29-CA—13733

BROWER'S MOVING & STORAGE, INC.

and

LOCAL 814, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Carol L. O'Rourke, Esq. and **James J. Paulsen, Esq.**
for the General Counsel
Michael Barrett, Esq., Friedman, Levy, Warren & Moss,
for the Charging Party
Robert S. Nayberg, Esq. and Richard A. Ivers, Esq.
Law Offices of Martin H. Scher, for the Respondent

DECISION

Statement of the Case

JOEL P. BIBLOWITZ, Administrative Law Judge: This case was heard by me on February 9, 1989 in Brooklyn, New York. The Complaint and Notice of Hearing herein, which issued on November 30, 1988,[1] and was based upon an unfair labor practice charge filed on October 11 by Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, alleges that Brower's Moving & Storage, Inc., herein called Respondent, violated Section 8(a)(1)(5) of the Act by repudiating and failing to abide by its contract with the Union by, *inter alia,* failing to make pension fund, welfare fund and annuity fund contributions, as required by the contract, and by failing to comply with the contract's terms regarding wages, holidays, vacations and union security.

Upon the entire record, I make the following:

Findings of Fact

I. Jurisdiction and Labor Organization Status

Therein being no dispute, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

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[1] Unless indicated otherwise, all dates referred to herein relate to the year 1988.

II. Facts and Analysis

Respondent is engaged in the warehousing and moving and storage business and has maintained a collective bargaining relationship (of sorts) with the Union since 1951. At that time, Respondent recognized the Union and the Union delegate came to Respondent's facility and had a number of employees (principally members of the Brower family) join the Union. From that time until his death in 1954, the Union delegate came to the facility regularly to collect Union dues from these individuals. From 1954 until the visit of Peter Furtado (as discussed, *infra*) nobody from the Union ever visited the shop. Respondent never formally negotiated a contract with the Union, but, apparently, every few years executed a Memorandum of Agreement agreeing to be bound by an agreement entered into by the Union with one of the employer associations with which it negotiates, and to execute the printed contract as soon as it was available. The last such Memorandum of Agreement is effective April 1, 1986 through March 31, 1989.

During 1988, Respondent had a complement of from ten to twenty employees; this number does not include Dorothy Golden, bookkeeper and sister-in-law of the owners. It does include Clifford Brower, Secretary-treasurer of Respondent ("I take care of the books in the office and work around the warehouse just like everybody else"), Wesley Brower, President of Respondent and another owner with Clifford Brower, Gary Brower ("He drives a truck, he works around the warehouse, anything that has to be done"), Wesley Brower's son and John Brower, a truck driver and also Wesley Brower's son. Gary and John Brower each owns some stock in Respondent. Gary and John Brower are two of Respondent's four regular drivers; Respondent also employs people who do

packing and warehousing.

At least since 1967, the only two employees for whom Respondent has transmitted dues and contributions to the Union are Clifford and John Brower. Until about 1956, Respondent, contributed, as well, for Wesley Brower; at that time, a representative of the Union told him that he could not work alongside the other employees, and Respondent ceased transmitting dues and contributions to the Union on his behalf. In about 1967, Respondent contacted the Union and informed them that it had a driver in its employ for about nine years and that it had not been deducting or transmitting dues or contributions on his behalf; at that time, Respondent and the Union entered into an agreement for the Respondent to pay about $20,000 to the Union over eighteen months so that the employee would be eligible for benefits upon his retirement. Respondent made the final payment pursuant to this agreement in 1969. Prior to 1982, Respondent also made the required contributions for employee George Finley and, possibly, others.

In 1981, the trustees of the Union's Welfare, Pension and Annuity Trust Fund, herein called the Funds, sued Respondent in Supreme Court, Queens County for failing to pay to the funds the sum of $14,105 for the period July 1975 through January, 1981;[3] the lawsuit added an additional $7,500 as interest and attorney's fees. By a Stipulation entered into in March 1982, Respondent agreed to pay $19,000 to the funds over a period of about two years and said payments were made.

By letter dated October 14, 1983 "to All Employers" (in-

[3] It is not clear whether this lawsuit covered payments only for John and Clifford Browers, or whether it included payments for others, as well.

cluding Respondent) the Union, by Charles Martelli, its Secretary treasurer, wrote:

> In accordance with the requirements of Section 21(A) of the Collective Bargaining Agreement, it is expected that each Employer shall mail, to the Union's office, no later than November 15, 1983, an up-to-date seniority list, showing the date of original hire and the classification seniority date for all employees.
>
> The above requirement must be complied with without exception.

On the bottom of this letter, Clifford Brower wrote: "Charlie—Please check and see what year we got in the Union and how many years we have to our credit." Underneath, he listed his name together with John Brower. By letter dated November 28, 1983, Martelli stated: "Please be informed that we are in receipt of your seniority list and wish to inform you of the following information." The letter gave October 16, 1967 as date of initiation for both, Clifford and John Brower, together their pension credits.

Other than the above recited situations, and the Complaint filed in the United States District Court for the Eastern District of New York on February 11 (as more fully described, *infra*) the Union has never filed a grievance or court action against Respondent, nor did any Union representative ever appear at Respondent's facility to question Respondent's compliance with the contract even though the uncontradicted testimony establishes that Respondent did not comply with a vast majority of the contractual terms, including the following:

Article 1 (Wages)
Article 3 (Birthday Holidays)
Article 4 (Vacations)
Articles 5, 6 and 7 (Job Classifications)
Article 9 E (Pay for Meals and Lodging for Overnight Hauls)
Articles 11 and 12 (Conditions and Rates Paid Employees)
Article 13 (Union Security Clause)
Article 16 (Check-Off of Dues)
Article 17 (Shop Steward)
Article 21 (Seniority)
Article 23 (Death in Family)
Articles 29, 30 and 31 (Pension, Welfare and Annuity Fund)
Article 32 (Cost of Living Allowance)

More particularly (as regards the more important of these provisions) Respondent did not pay the wages as set forth in the contract or make the contributions to the Union's funds for any of Respondent's employees except for Clifford and John Brower. In addition, Respondent did not maintain a seniority list, did not notify the Union upon the hiring of new employees or after their thirty first day of employment, and never had any employee designated as a shop steward. As stated, *supra,* in about 1956 Wesley Brower was informed that, as an owner of Respondent, he could not work on the trucks with members of the Union. At that time, Respondent ceased making payments to the Union and the funds on his behalf, but he "...still worked on the truck next to whoever was there with me", without any complaints from the Union.

Beginning in January, the Union has sent Past Due Notices

("This will inform you that your monthly payment to the Teamsters Local 814 Pension, Welfare and Annuity Trust Funds as set forth below has not been received. This matter needs your immediate attention".) to Respondent stating that the delinquency period was 1981 through 1987; apparently, Respondent never responded to these notices. Rather, Respondent continued to make the required contributions to the Funds for Clifford and John Brower, at least, through the end of 1987.

On December 21, 1987, Peter Furtado, who, at the time, was an auditor for the Funds, audited Respondent's books pursuant to the Funds normal procedures. On January 14, the Funds sent Respondent a Notice of Audit Delinquency stating that Respondent had underpaid the Funds in the amount of $239,000 for the period April 1983 through September 1987; that amount, together with interest and "liquidated damages" of twenty percent brought the amount Respondent owed to $377,000. Payment was demanded within fifteen days; Respondent was informed that if payment was not made the matter would be turned over to the Funds' attorneys. On February 11, 1988, the Funds sued Respondent in Federal District Court in Brooklyn for $239,000 plus interest, liquidated damages and costs. Apparently, this matter has not yet reached the trial stage. Respondent has not paid this amount to the Union.

Respondent defends on three grounds: there is no contract, even if there were a contract, it has long since been abandoned by the Union, and, even if it has not been abandoned, after so many years of not enforcing the agreements, the Union is estopped from attempting to do so now.

The Board has long held that an incumbent union generally

enjoys a presumption of continued majority status (a prerequisite, of course, to a Section 8(a)(5) violation) during the duration of a collective bargaining agreement. *Pioneer Inn Associates, d/B/A Pioneer Inn* and *Pioneer Inn Casino*, 228 NLRB 1263; *Colson Equipment, Inc.*, 257 NLRB 78. An exception to this rule was set forth in *Ace-Doran Hauling & Rigging Co.*, 171 NLRB 645 where the Board found that the contracts between the parties did not raise a presumption of regularity or that the union was the majority representative of the employer's employees.

> The evidence relating to the practice under the agreements further makes it clear that the parties did not intend them to be effective collective-bargaining contracts, but instead merely regarded them as arrangements under which Respondent agreed to check off dues, health and welfare, and pension payments for union members only. The acquiescence of the Unions in Respondent's failure both to enforce the union-security provisions of the agreements and to pay health and welfare contributions for all employees (as ostensibly provided by the "contracts"), makes it clear that the parties did not believe that they were in true collective-bargaining relationships.
>
> Since the alleged agreements are not such as would give rise to a presumption of majority status, we find that the General Counsel has failed to sustain his burden of proof and therefore that the complaint should be dismissed.

See also *Bender Ship Repair Company, Inc.*, 188 NLRB 615, *Weber's Bakery*, 211 NLRB 1; and *Glenlynn, Inc.*, 204 NLRB 299, which stated at 309:

However, the Board has held that this presumption may not attach following the termination of the contract where the contract does not define the bargaining unit with sufficient clarity or where the practices thereunder demonstrate that the parties never intended to establish a real bargaining relationship.

Apart from the ambiguity thus surrounding the scope of the bargaining unit, the evidence leaves one highly skeptical that a real collective-bargaining relationship emanated from the execution of the Alton contract. As previously discussed, it is undisputed that the Union neither administered the contract nor serviced the employees. As a result, not only were the employees deprived of contractual benefits pertaining to such matters as wage rates, health and welfare contributions, meals, uniforms, job duties, and holidays, but they were subjected to working conditions unilaterally imposed by the Respondent without any protest from the Union. Moreover, whatever grievances or complaints they had they personally presented to, and discussed with, management and it was not until the closing days of the contract that the Union undertook to submit several employee grievances to the Company. In addition to the Union's indifference to employee interests, it did not bother to enforce them. Apparently, the Union was not content with the few employees the Respondent periodically signed up for the Union and with the initiation fees and dues the Respondent deducted from the wages of these employees. It was only near the end of the contract term that the Union took more affirmative steps to enlist the Respondent's assistance to force the employees to join.

> In sum, I find that the parties never entered into a true collective-bargaining relationship out of which a presumption of the Union's majority status may arise. At best, the relationship was a token one where "the Union was willing to exact little in the way of contract enforcement and ... [the Respondent was] never satisfied to reap the financial benefits of lower costs." In these circumstances, and in view of equivocal nature of the bargaining unit, I find the evidence insufficient to support a presumption that the Union was the majority representative of the employees in the alleged Alton store unit.

I cannot imagine a better example of the situation referred to in *Glenlynn* and *Ace Doran, supra,* as the instant matter. Respondent initially recognized the Union in about 1951 and about every three years the Union sent Respondent a Memorandum of Agreement to execute; by signing each of these, Respondent agreed to be bound by the contract the Union was to negotiate with an association. After Respondent agreed to recognize the Union in 1951 (without any majority support from Respondent's employees) the Union's subsequent activity (up until the December 1987 audit of Respondent's books and the subsequent filing of the Federal Court action in February) was as follows:

After Respondent recognized the Union, a representative of the Union came to the Respondent's facility and signed Clifford and Wesley Brower as Union members; it is not clear whether any other employee joined the Union at that time.

In 1967, Respondent contacted the Union and informed them that it wanted Merriweather, a driver in its employ for nine years, to be a member of the Union and covered by the Funds

so that he could receive a pension from the Union upon retirement. The Union determined the amount due it since Merriweather began his employment, with Respondent in 1959—almost $20,000—and Respondent paid this amount to Respondent.

In 1981, the Union funds sued Respondent for $14,000 delinquency in payments to the funds from 1975; a year later, this matter was settled when Respondent agreed to pay this amount in installments. This lawsuit involved only the annuity, welfare and pension funds not any other payments Respondent failed to make under the contracts.

In 1983 the Union requested all employers under contract to supply them with a seniority list; Respondent asked the Union for the seniority dates of the only two individuals who were members—Clifford and John Brower—and the following month the Union supplied them with their date of initiation into the Union—1967.

On a monthly basis (beginning in, at least, April 1986) transmitted to Respondent a combined Monthly Welfare, Pension and Annuity Contribution Report with only John and Clifford's name filled in; Respondent then listed forty hours for each, together with the amount due and a check to cover this amount. Between the 1981 lawsuit and the December 1987 audit, Respondent never questioned these reports.

The record clearly establishes that aside from the dues and fund payments for Clifford, and John Brower (and for a period, Merriweather and Wesley Brower) the contracts between the parties were totally disregarded; employees were not members of the Union as required by the union security

clause of the agreement nor did they receive the terms and conditions of employment as specified in the contracts. Rather, it appears that (with the exception of the 1981 lawsuit) between 1951 and December 1987, the Union did nothing to enforce its contract with Respondent. General Counsel, in her brief, cites *Mr. Clean of Nevada, Inc.*, 288 NLRB No. 101. However, that case is distinguishable from the instant matter because that bargaining relationship lasted only two years and four months and involved deception by the employer. In the instant matter, the parties had a collective bargaining relationship for thirty six years before the Union took any action to enforce the contract, and Respondent never engaged in any positive deceptions; it simply made believe that the contract did not exist.

The 1986 through 1989 contract therefore does not give rise to a presumption of majority status, *Ace-Doran, supra,* I therefore find that the General Counsel has failed to sustain her burden of proof and accordingly recommend that the Complaint be dismissed.[3]

---

[3] Although I have recommended that the Complaint be dismissed on this ground, two other theories—members only and abandonment—should be mentioned. In *Don Mendenhall, Inc.*, 194 NLRB 1109 the Board refused to find a Section 8(a)(5) violation because the agreement between the company and the union was applied to members only. Members only is not applicable to the instant situation because the contract did not even cover the terms and conditions of employment of the only two members—John and Clifford Brower; it only covered them for the annuity, pension and welfare funds. On the other hand, I cannot imagine a clearer case of abandonment by a union; in the situation herein, the Union (as differentiated from the trustees of the Funds) made no attempt to enforce the provisions of its agreements with Respondent for approximately thirty six years. To me, this indicates an "unwillingness to represent the employees in the unit." *Road Materials, Inc.*, 193 NLRB 990 at 991. See also *Industrial Paper Stock Company*, 66 NLRB 1185. I would therefore recommend the dismissal of this Complaint for that reason, as well.

Conclusions of Law

1. Brower's Moving & Storage, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate Section 8(a)(1)(5) of the Act as alleged in the Complaint.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following recommended:

ORDER[4]

It having been found and concluded that Respondent, Brower Moving & Storage, Inc., has not engaged in unfair labor practices as alleged, the Complaint is hereby dismissed in its entirety.

Dated: April 11, 1989

Joel P. Biblowitz
Administrative Law Judge

[4] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX C

BEFORE THE NATIONAL LABOR RELATIONS
BOARD OF THE UNITED STATES OF AMERICA

----------X

BROWER'S MOVING & STORAGE, INC.,

Respondent/Employer,

and

LOCAL 814, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Union.

----------X

RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

The Respondent, BROWER'S MOVING & STORAGE, INC., excepts to the Decision of Administrative Law Judge Joel P. Biblowitz ("ALJ") dated 11 April 1989.

Pursuant to section 102.46 of the Rules and Regulations of the National Labor Relations Board, the Respondent sets forth the following exceptions to the ALJ's Decision:

Exception #1: To the finding that: "From 1954 until the visit of Peter Furtado ... nobody from the Union ever visited the shop." (ALJD 2 lines 15-16).*

Grounds: The ALJ erroneously found that Mr. Peter Furtado was a representative of the Union when he audited Respondent's books in or about December, 1987. In fact, Mr. Furtado was a field auditor employed by the benefit Funds and was not at the time employed by the Union. (Tr. 85-86 & 91.)

Exception #2: To the finding that "Other than the above-recited situations and the Complaint filed in the United States District Court of the Eastern District of New York on February 11 (as more fully described, *infra*) the Union has never filed a grievance or court action against Respondent. ..." (ALJD 3 lines 40-44)

*"G.C. Ex." refers to the exhibits of the General Counsel. "Tr." refers to the transcript of the hearing. "ALJD" refers to the Decision and recommended Order of the Administrative Law Judge dated April 11, 1990.

Grounds: The ALJ erroneously concluded that the Union initiated the action against Brower's and is a party to that action. In fact, the Funds commenced the action. The Funds are an independent and a distinct entity, separate and apart from the Union and the Union is not a party to that action. (G.C. Ex. 9 Complaint ¶4)

Exception #3: To the finding that "Beginning in January, the Union has sent Past Due Notices. ... (ALJD 4 line 38.)

Grounds: The ALJ erred in concluding that the Past Due Notices (which were admitted into evidence as G.C. Exhibit #6) were sent by the Union since Mr. Anthony Mandile, the Funds's Office Manager (Tr. 71) testified that the G.C. Exhibit #6 was sent by the Fund (not the Union). (Tr. 74.)

Exception #4: To the finding that "The Respondent has not paid this amount to the Union." (ALJD 5 line 12), in referring to the Federal District Court action.

Grounds: The ALJ's conclusion is in error since the Union is not a party to the Federal District Court action, has never demanded payment of the alleged delinquency and is not entitled to such payment. The word "Funds" should be replaced for the word "Union."

Exception #5: To the finding that "After Respondent agreed to recognize the Union in 1951 (without

any showing of majority support from Respondent's employees) the Union's subsequent activity (up until the December 1987 audit of Respondent's books and the subsequent filing of the Federal Court action in February) was. ..." (ALJD 7 lines 21-25.)

Grounds: The ALJ erroneously concluded that the 1987 audit was the Union's activity. The audit was the sole action of the Funds.

Exception #6: To the failed review and ruling on the Respondent's argument that the Union's failure to demand bargaining at any time rendered the charge invalid.

Grounds: The Union's failure to demand bargaining over the alleged contract violations at any time establishes a) an alternative ground for dismissal of the charge and b) supports the ALJ's conclusion that the Union did not have the support of the majority of the Respondent's employees (ALJD 8) and abandoned the collective bargaining relationship (ALJD 8 n. 3).

Dated: Carle Place, New York
May 25, 1989

Respectfully submitted,
Law Offices of MARTIN H. SCHER
Attorneys for Respondent
BROWER'S MOVING & STORAGE, INC.

S/ _____
By: Robert S. Nayberg

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